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Supreme Court, U.S.
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No. 04-49

IN THE

Supreme Court of the United States

TIG INSURANCE COMPANY,

Petitioner,

v.

SECURITY INSURANCE COMPANY OF HARTFORD;
TRUSTMARK INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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REPLY BRIEF

In its petition, TIG Insurance Company ("TIG") established that, in light of this Court's decisions in *Mastrobuono* and *Volt*, a conflict has arisen among the circuits on the issue whether a generic choice-of-law clause renders the Federal Arbitration Act ("FAA") inapplicable and thereby imposes state arbitration rules on the parties. Pet. 3-6. TIG identified the cases adopting the majority position held by the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, and the minority view held by the D.C. Circuit and Second Circuit in this case, *id.* at 15-20, and showed that this case implicates that conflict because the court below could not have concluded that California law governed arbitration under the majority rule, *id.* at 20-22. TIG also showed that the decision below misread *Mastrobuono*, *id.* at 24-25, unduly limited the scope of the FAA envisioned by Congress, *id.* at 22-23, and improperly construed the contract without regard for the views of the arbitral panel, *id.* at 26-29.

Respondent disputes each of these conclusions, but does nothing to undermine any of them. Respondent insists that the "lower courts have not reached conflicting decisions on the scope of choice-of-law provisions because of any disagreements over *federal* law," but instead have conflicted based on "*different* bodies of state contract law." Opp. 7. It argues that the leading case, *Roadway Package System, Inc.* v. *Kayser*, 257 F.3d 287 (3d Cir. 2001), "rests on an interpretation of Pennsylvania law that, by definition, cannot 'conflict' with the decision below." Opp. 14.

Respondent's argument is baffling because the Third Circuit could not have been clearer on this issue:

> No one contests that were this matter governed by state law, then the relevant rule would be supplied by the laws of the Commonwealth of Pennsylvania. But, as we have

> explained, this case is *not* governed by state law—it is governed by federal law.

257 F.3d at 294 (emphasis in original). Since then, the Fifth and Ninth Circuits have expressly adopted the analysis in *Roadway*. See *Action Indus., Inc.* v. *United States Fid. & Guar. Co.*, 358 F.3d 337, 341-43 (5th Cir. 2004); *Sovak* v. *Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002). Indeed, *all* of the cases adopting the majority rule are predicated *not* upon a review of state-law contract cases, but upon an analysis of this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). See note 2, *infra*. To be sure, the court below and the D.C. Circuit disagree with the majority, holding that *state* law provides the exclusive rule for decision in these circumstances. Pet. App. 8a; *Ekstrom* v. *Value Health Inc.*, 68 F.3d 1391, 1395 (D.C. Cir. 1995). Resolution of these competing views on an issue that the district court and court of appeals recognized as "troubling" and "recurring," Pet. App. 1a, 18a, plainly is something that this Court does "'sit to review.'" Opp. 7 (quoting *Volt Info. Scis., Inc.* v. *Board of Tr.*, 489 U.S. 468, 474 (1989)); see Sup. Ct. R. 10.

Respondent is left to argue that this case is a "not a suitable vehicle" because the choice-of-law clause is not "generic." Opp. 18 & 21. That argument is at war with the ruling respondent seeks to defend. The court below purported to apply cases construing "generic" choice-of-law provisions to *this* case because "generic" means, in this context, a choice-of-law provision that does "not mention arbitration." Pet. App. 10a; see *Roadway*, 257 F.3d at 297 & n.5. This case—which involves a "generic" choice-of-law provision that says nothing about arbitration—is thus an ideal vehicle because the decision below could not be supported under the majority rule. See *id.* at 296 ("a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards").

Respondent's claim that the decision below properly applied *Mastrobuono*, Opp. 10-12, is a merits argument based upon respondent's view that *Mastrobuono* was a case where certiorari was granted in error, *id.* at 11 n.4, and whose holding thus should be limited to its peculiar facts, *id.* at 6, 11. Courts of appeals in the majority have refused to read *Mastrobuono* so narrowly, see note 2, *infra*, while the decision below did precisely that, Pet. App. 8a-9a. Again, certiorari is warranted to resolve the appropriate scope of *Mastrobuono* (and *Volt*) given the conflicting views expressed by the circuits.

Lastly, respondent is wrong in suggesting that the views of the arbitral panel were properly ignored by the court of appeals. Opp. 21-23. Given the breadth of the arbitral clause, this Court's cases—and those of the courts of appeals—make clear that questions of "contract construction"—here, whether arbitration is governed by the FAA or state law standards—are for the arbitral panel. Or, as *Mastrobuono* explained, the views of the arbitral panel are the only ones "arguably entitled to deference." 514 U.S. at 60 n.4.

In sum, certiorari should be granted.

1. As TIG showed previously, this case implicates a deep conflict on a recurring issue of *federal* law. Pet. 15-22. Respondent dismisses that showing, arguing that this conflict "is overblown and inaccurate" because the "lower courts" have not conflicted based upon "disagreements over *federal* law." Opp. 7. That argument is refuted not only by the cases setting forth the majority rule, but also by the very decision that respondent seeks to defend.

a. TIG has demonstrated, Pet. 3, 15-16, that the majority rule within the circuit courts is exemplified by the Third Circuit's decision in *Roadway*. 257 F.3d at 294. There, through Chief Judge Becker, the *Roadway* court engaged in a thorough and thoughtful analysis of the interplay between the FAA and general choice-of-law provisions, *id.* at 293-96,

adopted a default federal rule, whereby a general choice-of-law provision would not be read to supplant the FAA with state arbitration rules, *id.* at 296-98, and carefully rejected alternative proposals of the sort advocated by respondent and the court below, *id.* at 298-99. Respondent argues that (1) *Roadway* "rests on an interpretation of Pennsylvania law that, by definition, cannot 'conflict' with the decision below," Opp. 14, and (2) TIG's contrary view is based on "a highly selective quotation from the decision," *id.* at 15.

The suggestion that *Roadway* turned on an analysis of state law is demonstrably false. The *Roadway* Court expressly rejected reliance upon state law and instead adopted a federal "default" standard based upon its reading of this Court's decisions and the requirements of the FAA. 257 F.3d at 294, 296-98. Respondent's charge of "highly selective quotation" is best answered, as quoted above, by the core ruling in *Roadway*. See *supra* at 1-2 (quoting *Roadway*, 257 F.3d at 294); *id.* at 297 (highlighting that *Roadway* adopted "default federal standards").

Respondent's argument that *Roadway* stands for the proposition that "whether a choice-of-law provision incorporates state arbitration standards is 'a matter of contract construction,' and contract law 'is mostly state law' that 'varies from state to state'" Opp. 14-15 (quoting *Roadway*, 257 F.3d at 293-94), is specious. The quotations that respondent lifts from *Roadway* appear in a foundational discussion of (1) why parties include choice-of-law provisions in their contracts as a general matter (*i.e.*, because "[c]ontract law is mostly state law, and it varies from state to state") and (2) why general "choice-of-law clauses" "have no applicability to answering" the question "whether the rule of decision is supplied by the laws of State X or by federal law." 257 F.3d at 293. Only by plucking snippets from this introductory discussion and by omitting the core of the court's analysis can respondent attempt to avoid *Roadway*'s

ultimate ruling that "this case is *not* governed by state law—it is governed by federal law." *Id.* at 294.

Respondent fares no better in suggesting that the decision below does not conflict with *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir. 1998). Respondent argues that "the asserted 'conflict' between *Wolsey* and the decision below rests entirely on a disagreement about the meaning of California law." Opp. 13. That argument, however, ignores the opinion below, which rejects *Wolsey* not because the Second Circuit disagreed with the Ninth Circuit's view of *California* law, but because the court below concluded that *Wolsey* "relied on its interpretation of *Mastrobuono*" and "did not predict how the California Supreme Court would rule on the question of state law." Pet. App. 9a n.4. Simply put, the decision below rejected the Ninth Circuit's holding because it recognized that *Wolsey* was *applying* federal law rather than state law.[1]

Any possible doubt regarding the Ninth Circuit's *own* view of its law has since been resolved by *Sovak*, 280 F.3d at 1269-70. There, the Ninth Circuit expressly followed the Third Circuit in *Roadway* by holding, as a matter of federal law, that "the strong default presumption is that the FAA, not state law, supplies the rules for arbitration." *Id.* Thereafter, the Fifth Circuit, relying on *Roadway* and *Sovak*, adopted the same default rule, holding that a general choice-of-law provision does "not express the parties' clear intent to depart from the FAA's vacatur standard." *Action Indus.*, 358 F.3d at

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[1] Although *Wolsey* cites state-law cases to reject reliance upon certain extrinsic evidence, 144 F.3d at 1210-11, it is clear that *Wolsey* relied upon *Mastrobuono* rather than state law to conclude that "general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators," *id.* at 1211-13. Respondent accuses TIG of inconsistency, Opp. 14 n.6, but ignores that it successfully argued to the Second Circuit, Pet. App. 9a n.4, that "the Ninth Circuit in *Wolsey* was not interpreting California law." Brief of Security Ins. Co. of Hartford at 19, No. 03-7773 (2d Cir. filed Aug. 11, 2003).

343; see also *Smith Barney, Inc.* v. *Critical Health Sys.*, 212 F.3d 858, 861 n.1 (4th Cir. 2000) (ruling that "arbitration contracts must be construed in accordance with federal law"). Contrary to respondent's suggestion, the cases adopting the majority rule cannot be read "as resting on the application of *state* contract law to the choice-of-law provisions," Opp. 15, because they all adopted *Mastrobuono*'s requirement that parties must express a clear intent to opt-out of the FAA's standards, and that a general choice-of-law provision does not suffice to express that intent.[2]

Respondent does not dispute that, in stark contrast, the decision below rejected reliance upon *Mastrobuono* and instead concluded that California law alone governed the court's analysis of the general choice-of-law provision. Pet. App. 9a ("how does California law interpret the choice-of-law provision utilized in this contract"). Similarly, respondent does not dispute that in *Ekstrom*, 68 F.3d at 1393, the court of appeals relied solely on the District of Columbia's choice-of-law rules to conclude that a general choice-of-law provision displaced the FAA's standards. *Id.* at 1395-96. There can be no dispute that this case presents a deep conflict on a recurring federal issue of national significance.

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[2] *E.g.*, *PaineWebber Inc.* v. *Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) (following "principles and analysis set forth in *Mastrobuono*"); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d 380, 382-84 (4th Cir. 1998) (adopting the "heavy federal presumption in favor of arbitrability"); *Ferro Corp.* v. *Garrison Indus. Inc.*, 142 F.3d 926, 937 (6th Cir. 1998) (reversing lower court for failing "to apply and follow the rationale set forth in *Mastrobuono*"); *Kelley* v. *Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995) ("The *Mastrobuono* holding compels our conclusion"); *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 996 (8th Cir. 1998) (same). Respondent's reliance upon *Mount Diablo Medical Center* v. *Health Net of California, Inc.*, 124 Cal. Rptr. 2d 607 (Cal. Ct. App. 2002), as setting forth "the meaning of California law," Opp. 14, is itself ironic since that decision was based almost entirely upon an analysis of *federal* cases interpreting *Mastrobuono* and *Volt*. *See* 124 Cal. Reptr. 2d at 610-18.

b. As TIG previously showed, this case is an ideal vehicle to resolve this conflict because, if the court below had applied the majority rule, it could not have concluded that California arbitration law governed this dispute. Pet. 20-22.

Respondent seeks to undermine that conclusion, arguing that review should be denied because this case does not involve a "'generic' choice-of-law provision[]." Opp. 18; *id.* at 7. The opinion below wholly refutes that claim. Below, the court of appeals purported to apply cases addressing the scope of choice-of-law provisions that were deemed "generic" because they "'did not mention arbitration.'" Pet. App. 10a (citing *Mount Diablo*). Thus, the court of appeals decided *this* case based upon its view of the law governing the effect of "a generic choice-of-law clause" on the dealings of "sophisticated commercial parties." *Id.*

Indeed, respondent argued to the court of appeals that California had adopted a rule whereby "the law chosen in a *general* choice-of-law clause applies to all . . . aspects of the contractual relationship" and that "[i]n this case the language of the choice of law clause" is "virtually identical to the language" in those cases. Brief of Sec. Ins. Co. of Hartford at 16, 17 (emphasis added). Plaintiff cannot convince the court below that the choice-of-law clause is generic and then oppose further review by arguing conveniently that the same clause has ceased to be "generic." Opp. 18; see *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase'") (quoting *Pegram* v. *Herdrich*, 530 U.S. 211, 227 n.8 (2000)).

As respondent observes, Opp. 18, the Third Circuit ruled that parties can "contract around the default federal standards" by providing, for example, "that any controversy shall be settled by arbitration in accordance with the terms of the Pennsylvania Uniform Arbitration Act," *Roadway*, 257 F.3d at 297 (internal quotation omitted). The choice-of-law

provision here contains no such statement. Further, the observation by the court below that "[i]f the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules" Pet. App. 11a, reverses the "default federal standards" in *Roadway* and conflicts with its rule that "the FAA standards control 'in the absence of contractual intent to the contrary,'" 257 F.3d at 296 (quoting *Mastrobuono*, 514 U.S. at 59).

c. Finally, respondent contends that the decision below "would not give rise to a conflict worthy of this Court's attention." Opp. 18-19. That suggestion ignores the views of the courts below in this case, which recognized the issue presented as "recurring and troubling" Pet. App. 1a, and "a fertile source of debate, with state and federal courts arriving at conclusions far too varied to mention here," *id.* at 18a (footnote omitted) (rejecting "default rule" of *Roadway* and *Sovak*). The conflict among the federal courts of appeals is precisely the sort that warrants final resolution by this Court.

Respondent's assertion that the cases in the majority "rest upon the fact that the state laws sought to be incorporated by the choice-of-law provision would have been preempted if they applied of their own force," Opp. 20, was expressly rejected by the Third Circuit, see *Roadway,* 257 F.3d at 298. There, Judge Becker rejected an approach whereby a court would apply a different presumption when faced with "state arbitration rules that do not 'conflict' with the FAA" because that proposal "would unduly complicate the law," without "effectuating the intent of most contracting parties." *Id.* at 298, 299.

2. Respondent also contends that certiorari should be denied because, in its view, the court below properly applied *Volt* and *Mastrobuono*. Opp. 8-12. That is not a basis for denying review of a circuit conflict arising from those cases, but instead reflects an argument regarding how the conflict generated by *Volt* and *Mastrobuono* should be resolved *after*

certiorari has been granted. A full response to that argument is neither warranted nor possible in the limited space available, but a number of comments warrant a brief reply.

Contrary to respondent's argument, *Volt* did *not* require "this Court to decide whether the inclusion of a choice-of-law provision in an arbitration agreement expressed the parties' intention to be governed by a state rule of arbitration." Opp. 8. Rather, as explained in *Mastrobuono*, the *Volt* Court "did not interpret the contract *de novo*," but "[i]nstead . . . deferred to the California court's construction." 514 U.S. at 60 n.4. *Volt* thus stands for the core proposition that the FAA allows parties to agree "to arbitrate under different rules than those set forth in the Act itself." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). *Volt*, however, says little regarding whether a general choice-of-law clause reflects that intent.

In contrast, *Mastrobuono* provides significant guidance on this issue under the FAA. The circuit courts applying *Mastrobuono* have refused to limit it to "the particular terms of the contract before the Court." Opp. 6; see note 2, *supra*. Nor should they adopt such a crabbed reading since the *Mastrobuono* Court explained that it granted review to decide a broader question that arose because "the Courts of Appeals ha[d] expressed differing views on whether a contractual choice-of-law provision may preclude an arbitral award of punitive damages that otherwise would be proper" under the FAA. 514 U.S. at 55.[3] Here, as in *Mastrobuono*, TIG seeks

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[3] Respondent implies that the grant of certiorari in *Mastrobuono* was improvident, arguing that the "Court did not grant certiorari" on the issues that ultimately were decided. Opp. 11 n.4. That speculation ignores not only the Court's explanation why certiorari was granted, but also the Petition for Certiorari, which sought resolution of a circuit conflict on whether "the law of a state named in a choice of law provision, rather than the Federal Arbitration Act, governs the arbitrability of a claim . . . ." Petition for Writ of Certiorari at i, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (No. 94-18). The alternative federal

review to resolve an equally important conflict regarding whether a choice-of-law clause incorporates state law arbitration rules and renders the FAA inapplicable.

3. Finally, respondent ignores this Court's cases—and the circuit courts—ruling that where parties have agreed to a broad arbitration clause, issues of contract construction should be resolved, at a minimum, with deference to the views of the arbitral panel. See *Mastrobuono*, 514 U.S. at 60 n.4; *see also* Pet. at 26-29 (citing cases).[4]

Respondent is mistaken that this Court cannot consider the arbitral panel's refusal to grant a stay to respondent. Opp. 22. The courts below expressly ruled that their interpretation of the parties' contract would not be constrained by the arbitral panel's prior denial of the stay sought by respondent. Pet. App. 11a, 27a-28a & n.10. Indeed, in *Green Tree Financial Corp.* v. *Bazzle*, a plurality of this Court, *sua sponte*, ordered that the arbitrator (rather than the court) interpret the parties' agreement. 123 S. Ct. 2402, 2408 (2003).

CONCLUSION

For the foregoing reasons, and those in the Petition, the petition for a writ of certiorari should be granted.

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issue that respondent deems "significant," was not presented in the Petition for Certiorari, was identified in a government brief filed *after* certiorari was granted, Opp. 11 n.4, and ultimately was disposed of by the Court in a footnote, 514 U.S. 61 n.6.

[4] *See Bailey* v. *Ameriquest Mortgage Co.*, 346 F.3d 821, 824 (8th Cir. 2003); *Pedcor Mgmt. Co. Welfare Benefit Plan* v. *Nations Personnel of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003); *Anders* v. *Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1032-33 (11th Cir. 2003). Although these decisions do not involve choice-of-law provisions, Opp. 22, they follow cases by this Court involving choice-of-law provisions in this context and make crystal clear that arbitrators presumptively should decide disputes regarding the meaning of a contract.

Respectfully submitted,

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